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No. 85-1223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD H. KUMMEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

[I] Whether a jury instruction directing the trial jury to infer that the defendant ordinarily intends the natural and probable consequences of his knowing acts and that the accused intended all the consequences of such acts are prohibited under the decisions of the Court in *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana*, 442 U.S. 510 (1979)?

[II] Whether the current *split-in-Circuits* as to the interpretation of *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) merits the granting of this Petition and the vacation of the conviction below?

[III] Whether *Connecticut v. Johnson*, 460 U.S. 73 (1983) really means that an instruction such as given in this case can be treated as harmless error?

[IV] Whether the trial court's declination to answer the only real question in the case violates the ruling in *Bollenbach v. United States*, 326 U.S. 607 (1946)?

CERTIFICATE OF INTEREST

The Petitioner, Richard H. Kimmel, is represented in these proceedings by Attorney Allan A. Ackerman, Esq., 2000 N. Clifton Avenue, Chicago, Illinois 60614.

Neither party has any other interest nor represents any other party or interest in these proceedings.

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RICHARD H. KIMMEL,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Richard H. Kimmel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 27, 1985.

OPINION BELOW

The Opinion of the Court of Appeals is recorded as *United States v. Richard H. Kimmel.* It is located in the Official Federal Reporters at 777 F.2d 290 (CA 5, 1985). The decision below is attached to this Petition as Group Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on November 27, 1985. No petition for rehearing was requested.

The timeliness of this petition is governed by the sixty (60) day jurisdictional requirement. This petition is timely filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOKED

United States Constitution,
Fifth Amendment

AMENDMENT [V.]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, "nor be deprived of life, liberty, or property, without due process of law;" nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On December 17, 1983, a federal grand jury, in Greenville, Mississippi, returned a twenty-four (24) count indictment against Kimmel. The indictment alleged that Kimmel committed twenty-three (23) acts of mail fraud in violation of 18 U.S.C. §1341 in that from approximately January, 1980 to and including April 18, 1980 Kimmel caused to be mailed certain *false submittal sheets*. Kimmel was the then-president of *Medart, Inc.*, a manufacturing business located in Greenwood, Mississippi. The sheets were sent to ITT, a credit corporation doing business throughout the United States.

Count 24 of the indictment alleged that on or about October 2, 1980 Kimmel threatened Susan Fischer, . . . his secretary at Medart . . . a woman who had received a subpoena to give testimony in a related U.S. bankruptcy proceeding. Count 24 was brought in violation of 18 U.S.C. §1503.[1]

Kimmel purchased Medart, Inc., a Mississippi corporation in approximately October, 1976. In connection with his purchase of that corporation a financial lending corporation, ITT, loaned Kimmel and Medart monies (Tr. 6-20, 31, 32).[2] The monies were covered by four (4) separate loan agreements, all executed as between Kimmel-Medart and ITT in October, 1976. These multiple loan agreements

[1] Throughout the proceedings below Kimmel was enlarged on bail and represented by retained counsel.

We have reproduced as Group Appendix B the statutes involved, 18 U.S.C. §§1341 and 1503.

[2] Tr., refers to the trial transcript below.

covered the inventory, machinery and equipment, land and accounts receivable (hereafter ARA).[3]

In *December, 1979,* Ms. Susan Fischer, Kimmel's secretary, elected not to send receivables to ITT (Tr. 213-221). She had contacted ITT requesting monies to meet the Medart payroll; ITT declined to send the monies and Ms. Susan Fischer, made the unilateral decision to divert monies ordinarily sent to ITT (*id.* at 213). She took the receivables, caused them to be deposited in a Medart bank account and used those monies to pay the employees.

After that, commencing either in mid-December, 1979, or shortly thereafter, Kimmel opened a WORKING FUND ACCOUNT (hereafter WFA). Receivables were deposited into the WFA and those monies were used to pay the Medart overdrafts and other corporate bills (Tr. 218-221). ITT was not told about the WFA.

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[3] The ARA refers to the accounts receivable agreement as between Medart and ITT. It was the purported violation of this loan agreement that formed the basis of the twenty-three (23) mail fraud counts involved both in the indictment and conviction.

Under the ARA Medart was to send all monies received to ITT in exchange for ITT sending monies to Medart on a regular requested basis.

This business agreement as between these two (2) corporations continued from approximately 1976 through the late fall of 1979.

During the late fall of 1979 ITT (according to Medart) breached the agreement in that ITT refused to send Medart all the monies to which they were entitled under the revolving financing agreements. Thereafter, commencing in either late December, 1979 or early January, 1980 Medart diverted monies ordinarily sent to ITT into the Medart WFA. The subsequent written submissions (transmittals) to ITT . . . were falsified to indicate that Medart received less monies than Medart actually received. The basis for the twenty-three (23) mail fraud counts were the false transmittals from Medart to ITT.

The government *stipulated* that the DIVERTED monies . . . approximately one-half million dollars went into the WFA and thereafter, into the Medart general account (Tr. 236).[4]

The controversy during the jury trial was whether the particular ARA was violated either by ITT, or Medart, or both of them. If ITT breached the agreement to give Medart the monies they were entitled to—then Kimmel was justified in retaining Medart monies and putting them into the WFA for the purpose of paying Medart bills and overdrafts (Tr. 386-438).[5]

On May 6, 1980 Kimmel caused federal bankruptcy proceedings to be commenced on behalf of Medart (Tr. 439-441). This was because Kimmel had received a *demand* letter from ITT indicating that ITT was *calling* all the Medart loans (Tr. 438-441). A prosecution witness, Anderson, testified that when ITT called the loan . . . Medart would be required to pay millions of dollars at one time

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[4] The Court of Appeals at A-2 states that the REPORTS omitted payments totaling over $660,000 and that Kimmel diverted [these] monies into his personal bank accounts. The government stipulated to the contrary and the Court of Appeals is in clear error on that score.

[5] The twenty-three (23) counts of mail fraud each involve Medart mailing a statement to ITT along with monies. The statement was suppose to accurately reflect the monies Medart received and submitted to ITT as per the ARA. From approximately mid-January, 1980 through mid-April, 1980 the transmittals from Medart to ITT did not accurately reflect the monies received by Medart; thus the government charged Kimmel [on behalf of Medart] with having committed the offenses of mail fraud by virtue of submitting inaccurate transmittal statements to ITT.

As previously stated Medart maintained during trial that they were justified in retaining monies received because ITT breached the original agreements . . . by withholding from Medart monies needed by Medart for the day-to-day operation of that corporation.

and that was when Medart sought relief in the bankruptcy court; Medart either had to close, go into Chapter 11, or find someone to pay ITT (Tr. 490-493).

During the bankruptcy proceedings Kimmel was allowed to continue to operate Medart as per the order of the federal bankruptcy court and, according to the government witnesses . . . Kimmel did an excellent job (Tr. 495-497).

None of the several government witnesses could tell the jury whether Medart was justified in withholding or diverting monies based upon an analysis of the four (4) agreements (cf., Tr. 505, 670-680).

Kimmel offered witnesses and Kimmel testified on his own behalf. Kimmel told the jury he spoke to attorneys about the contracts (Tr. 819) and according to Kimmel he was told he was justified in keeping the monies so long as he retained a ledger and kept the records (Tr. 852, 853).

Eventually, according to the evidence, Medart came out of bankruptcy in June, 1981, and ITT received all the monies owed by Medart (Tr. 854).[6]

The jury deliberated Kimmel's guilt *vel non* for a period of some 10 or 11 hours spread over two (2) separate days.

The trial court gave three (3) separate ALLEN charges.

The trial court originally charged the jury that:

> "As a general rule, it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw

[6] Counsel for Kimmel proffered the release from ITT to Kimmel showing ITT was fully paid and, based on government objections, that release is withheld from the jury (Tr. 854-861).

> the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the Defendant did possess the required intent," (Tr. 14; 10/17/84).[7]

* * * * *

At approximately 6:00 p.m. on October 17, 1984 the jury requested that the trial judge help. The jury wanted to know:

> "If the first party, ITT, does not live up to certain parts of the contract, withholding nine hundred thousand dollars credit and cutting money returned to fifty percent, would this relieve Medart of the obligation of sending all receivables to ITT? Signed M. Shaw," (Tr. 34; 10/17/84).

The trial court did not answer the jury; the trial judge aborted his earlier sequestration order and simply sent the jury home for the night (Tr. 35, 36; Tr. of 10/17/84).

The next morning the jury acquitted Kimmel of the attempted obstruction of justice count and found Kimmel guilty of the multiple mail fraud count.

Kimmel was sentenced to six (6) years in custody and he is currently serving his sentence at the F.C.I., Oxford, Wisconsin.

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[7] The Court of Appeals treated this instruction under a PLAIN ERROR theory. The Court of Appeals never reached the question of harmless error *vel non*, 777 F.2d at 292, 293.

REASONS FOR GRANTING THE WRIT

[I] Whether a jury instruction directing the trial jury to infer that the defendant ordinarily intends the natural and probable consequences of his knowing acts and that the accused intended all the consequences of such acts are prohibited under the decisions of the Court in *Francis v. Franklin,* ___ U.S. ___, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana,* 442 U.S. 510 (1979)?

[II] Whether the current *split-in-Circuits* as to the interpretation of *Francis v. Franklin,* ___ U.S. ___, 105 S.Ct. 1965 (1985) merits the granting of this Petition and the vacation of the conviction below?

[III] Whether *Connecticut v. Johnson,* 460 U.S. 73 (1983) really means that an instruction such as given in this case can be treated as harmless error?

[IV] Whether the trial court's declination to answer the only real question in the case violates the ruling in *Bollenbach v. United States,* 326 U.S. 607 (1946)?

QUESTIONS [I], [II] AND [III]

At trial, Kimmel testified that he did not *intend* to defraud ITT (Tr. 850, 851). The reasons he diverted the monies to the WFA (Medart's) included both the advice of counsel and the fact that ITT had taken over one million dollars from Medart, absent explanation, kept the money and because he thought ITT was trying to squeeze out Medart (Tr. 845-848, 850-853). Kimmel testified that he took nothing from ITT except that which he believed ITT owed Medart; Kimmel never had any INTENT to defraud ITT (Tr. 870).

Thus, the primary question to the jury revolved around Kimmel's INTENT. The question thus becomes under circumstances such as these was the instruction prohibited?[8]

In *Francis v. Franklin*, 471 U.S. ____ , 105 S.Ct. 1965 (1985) the Court affirmed the granting of a new trial while reviewing constitutional prohibitions against presumptive jury instructions. The Court explained the differences as between mandatory presumptive instructions and permissive inference instructions (*id.* at 1971-1973). The Court found that even a permissive inference [instruction] may be violative of the Due Process Clause. The Court stated:

> "A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven. Such inferences do not necessarily implicate the concerns of *Sandstrom*. A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. *Ulster County Court, supra*, 442 U.S., at 157-163, 99 S.Ct., at 2224-2227." (471 U.S. at ____ , 105 S.Ct. at 1971).[9]

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[8] The instruction here read:

> "As a general rule, it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the Defendant did possess the required intent," (Tr. 14; 10/17/84).

[9] The Court below found that the instruction at bar allowed for a permissive inference and therefore the giving of the instruction

(Footnote continued on following page)

In this particular case, just as in *Francis v. Franklin*, the only contested question was INTENT. Thus, the giving of the instruction in this case was the equivalent of a mandatory presumption instruction . . . the type of instruction found to be violative of the Due Process Clause both in *Francis v. Franklin* and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Kimmel suggests, that in this case, the presumption or inference allowed the prosecution to avoid the necessity of proving up the critical element in the case . . . that critical element being whether Kimmel intended [specific intent offense, §1341] to commit the offense.

The Court below agreed that this Court and the Fifth Circuit have struggled often with inferred intent instructions . . . but, further, the instruction at bar was [is] clearly acceptable, 777 F.2d at 292. The Court below was wrong. Other Fifth Circuit decisions found the same instruction to be error.[10]

In *Wiley v. Rayl*, 767 F.2d 679 (CA 10, 1985) the Court vacated the denial of §2254 relief while reviewing a strik-

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[9] *continued*
was not error (777 F.2d at 292). The Court below declined to further review whether *under the facts of the case* the permissive inference violated the Due Process Clause (777 F.2d at 292, 293).

[10] In *Garland v. Maggio*, 717 F.2d 199 (CA 5, 1983) the Court found a strikingly similar instruction to be error (*id.* at 203, 204) but that the error, under the facts of the case, was harmless error primarily because intent was not involved in the defense in that case (717 F.2d at 204).

However, in *United States v. Merkt*, 764 F.2d 266 (CA 5, 1985) the Court reversed a criminal conviction involving the transportation of aliens because a similar instruction was given the jury, 764 F.2d at 272. In *Merkt*, while reversing, the Fifth Circuit cited, *inter alia*, *Francis v. Franklin*, 764 F.2d 272, n. 15.

There is almost no difference in those two (2) cases and that at bar. The Fifth Circuit analysis is clearly erroneous.

ingly similar instruction (767 F.2d at 681). That Court found it was unable to distinguish as between the instructions during the *Wiley* trial and the condemned instructions in *Francis v. Franklin*. The Court in *Wiley* stated:

> "We cannot distinguish the instructions submitted in *Franklin* and there found to be unconstitutional from the challenged instruction in the instant case. Under both the jury is effectively told to presume a criminal intention by the defendant once the state has established that he acted voluntarily; both instructions also inform the jury that the defendant may rebut the presumption by contrary evidence." (767 F.2d at 681).[11]

In both *Engle v. Koehler*, 707 F.2d 241 (CA 6, 1983) and *Petition of Hamilton*, 721 F.2d 1189 (CA 9, 1983) the Court in each case ruled for the petitioners while reviewing instructions similar to those at bar. In *Engle*, while granting relief, the Court found that only in rare cases would harmless error be found when an instruction such as that at bar was given and where intent was a primary trial issue (707 F.2d at 246).[12]

In *Petition of Hamilton* the Court granted relief and on remand directed that the Court below review only the question of whether intent was an issue below, and if it

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[11] The *Wiley* Court found that it was unnecessary to confront any harmless error question because the contested trial issue was the intent of the defendant. Under such circumstances (intent being the issue) there was no occasion to consider harmless error *vel non*, 767 F.2d at 682.

[12] The *Engle* Court reviewed *Connecticut v. Johnson*, finding that four justices favored a traditional harmless error approach (balancing) while four others would find harmless error only in rare cases (e.g., where the defendant conceded the intent issue), 707 F.2d at 246. This Court affirmed *Engle*, ____ U.S. ____, 104 S.Ct. 1673 (1984).

was then relief MUST BE GRANTED and if it was not, then the lower court was to determine whether the instruction was harmless beyond a reasonable doubt.[13]

The Eleventh Circuit has reviewed similar instructions in the recent cases of *Corn v. Kemp*, 772 F.2d 681 (CA 11, 1985) and *Carter v. Montgomery*, 769 F.2d 1537 (CA 11, 1985). In both cases the Court granted relief. In *Corn* the Court had no occasion to review harmless error in that the Court found that the prohibited instruction was strikingly similar to the reviewed instructions in *Francis v. Franklin* . . . and thus the *Corn* Court granted relief, 772 F.2d at 683. However, in *Carter v. Montgomery* the Court went on to review the prohibited instruction and *harmless error*. The *Carter* Court while making no reference to *Connecticut v. Johnson* did find that there could be no harmless error where lack of intent was placed-in-issue, 769 F.2d at 1541, 1542. However, the Court did find the Eleventh Circuit test to be harmless beyond a reasonable doubt . . . *id.* at 1542.[14]

In *Fournier v. LeFevre*, 734 F.2d 125 (CA 2, 1984) the Court affirmed in part and vacated in part, §2254 relief.

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[13] *Hamilton* interpreted *Connecticut v. Johnson* as stating where intent is at issue . . . the prohibited instruction(s) can never be harmless error . . . 721 F.2d 1190. The Ninth Circuit later reviewed *Hagler v. Callahan*, 764 F.2d 711 (CA 9, 1985). In *Hagler*, the Court vacated §2254 relief finding that the prohibited instructions were harmless error. Circuit Judge Fletcher *dissented* on the theory that there could be no harmless error where the prohibited instruction was given and intent was a trial issue, 764 F.2d 716-720. Both the majority and dissent in *Hagler* struggled to interpret *Connecticut v. Johnson*.

[14] In accord, *Miller v. Norville*, 775 F.2d at 1572 (CA 11, 1985) (granting §1154 relief finding, *inter alia*, that under *Francis v. Franklin* a particular Florida statute lacked constitutionality because it contained presumptive language).

The Court reviewed a case where the prohibited type of instructions given and found that there was harmless error, beyond a reasonable doubt notwithstanding *Connecticut v. Johnson*. In *Fournier* the intent question was such that—that petitioner clearly intended to commit an illegal act with the weapon involved in the prosecution. Under such circumstances the Court reasoned that the intent question was not truly at issue and therefore the harmless error analysis was applicable (734 F.2d at 128, 129).[15]

In *Fulton v. Warden*, 744 F.2d 1026 (CA 4, 1984) the Court, by split decision, denied §2254 relief finding that the prohibited instructions were not applicable in light of an alibi defense . . . thus taking the question of intent totally out of the case. The majority found harmless error beyond a reasonable doubt as per *Connecticut v. Johnson* while the dissent found that the instruction could not take the case out of the harmless error situation (the dissent suggested that under *Connecticut v. Johnson* there could not be harmless error . . . 744 F.2d at 1034-1040.[16]

The present confusion as to the application and use of the *presumptive/intent*-type of instruction is the subject of terse summation by Circuit Judge Hill in *Brooks v. Kemp*, 762 F.2d 1383 (CA 11, 1985). In *Brooks* the *en banc* Court found a similar instruction to be reversible error. Circuit Judge Hill, while concurring . . . wrote:

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[15] *Fournier* quotes, with approval, Justice Powell from his dissent in *Connecticut v. Johnson*, 734 F.2d at 128. The *Fournier* Court did not decide which of the *Connecticut v. Johnson* approaches or tests were applicable in that under the facts of the case . . . the error was harmless beyond a reasonable doubt (*id.* at 128, 129).

[16] Cert. denied, ____ U.S. ____, 105 S.Ct. 3532 (1985).

"Judge Kravitch resolves it against the petitioner, presumably by reasoning, as so many other eminent jurists have reasoned, that a person may be presumed to intend the natural and probable consequences of his deliberate acts. If it is unconstitutional to permit a juror to do that, I conclude reluctantly that I may not.

I confess that I find the harm by applying the reasoning of the *Mann* instruction, and I acknowledge that the *Mann* instruction, and those like it, are now condemned. I apprehend that if the harm can be found in the reasoning of those instructions, it must *a fortiori* appear in today's jurisprudence." (762 F.2d at 1422).[17]

There is an abundance of confusing, disjointed decisional authority today. *Francis v. Franklin* is the law but the Court in the instant case declined to either follow or understand that even a permissive inference instruction may . . . where intent is the only issue . . . be violative of Due Process. The multiple problems encountered while evaluating instructions relative to presumptions/inference . . . and intent are manifold. In *Davis v. Kemp*, ____ U.S. ____, 105 S.Ct. 2689 (1985) Justices White, Brennan and Marshall dissented from the denial of certiorari. Justice White, in his separate dissent pointed out that since *Sandstrom v. Montana* the Court has had four (4) separate opportunities to decide whether [a] *Sandstrom* error may

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[17] *Mann* refers to *Mann v. United States*, 319 F.2d 404 (CA 5, 1963). *Mann* gave conditional approval to the presumptive/intent type of instructions . . . but the Fifth Circuit later overruled *Mann* in *United States v. Chiantese*, 560 F.2d 1244 (CA 5, 1977) (*en banc*).

In *Brooks v. Kemp*, the Court granted plenary relief while reviewing a §2254 petition. The Court found that the instructions in the case (similar to those at bar) were not harmless beyond a reasonable doubt.

be harmless under any circumstance. Justice White pointed out that the resolution of the question is important because of the frequently reoccurring question (105 S.Ct. at 2690, 2691).

Only through this Court accepting this petition and reviewing the semantic differences as between presumptive and permissive inference instructions can there be a realistic Circuit clarification. Instructions including language such as used in this case should simply be banned. No more, no less. In that way, the instant confusion would be dissipated and the criminal justice system will have been elevated to a point where judges and lawyers can understand the parameters of such instructions.

QUESTION [IV]

In *Bollenbach v. United States*, 326 U.S. 607, 66 S.Ct. 402 (1946) the Court vacated a series of conspiracy convictions because of the failure of the trial judge to give proper supplemental jury instructions. The Court, while reversing stated:

> "When a jury makes explicit its difficulties a trial judge should *clear them away with concrete accuracy*," (66 S.Ct. at 405, emphasis ours).

Bollenbach continued with the following:

> "a conviction ought not to rest on an equivocal direction to the jury on a *basis issue*," (66 S.Ct. at 405, emphasis ours).

Assuming, *arguendo*, that *Bollenbach* represents the current law in federal courts then the instant petition should be granted and the conviction vacated.

At approximately 6:00 p.m. on October 17, 1984 the jury requested that the trial judge help. The jury wanted to know:

"If the first party, ITT, does not live up to certain parts of the contract, withholding nine hundred thousand dollars credit and cutting money returned to fifty percent, would this relieve Medart of the obligation of sending all receivables to ITT? Signed M. Shaw," (Tr. 34; 10/17/84).

The trial court answered this direct inquiry with the following:

That is a question of fact, which you must answer from the testimony that you have heard. It is not a question that the Court can answer. That is your obligation, your responsibility and your area, not mine, to answer that question. You take that answer from the testimony that you have heard that has been presented to you.

Since it is now six o'clock, I am going to recess you for the day. It has been a long day for everybody, but as I mentioned to you earlier, this is a case that has been in trial now for a long time and there is a lot invested in it from everybody's standpoint and I would, of course, like to see this case disposed of one way or the other and not to have to go through the whole thing again with another jury.

As I mentioned to you, another jury, I would have no reason to believe that we could get a better jury to decide the case than we have now, one way or another, so I am going to recess you now for the night and rescind my prior order that you be sequestered and let you go home your individual ways until tomorrow morning at nine o'clock.

Let me reiterate to you now even more so than before, the instruction that you are not to discuss this case with anybody and you should not read anything about it that is reported in any of the news media or listen to anything about it that is in any of the news media. You are to decide the case on solely what you have heard here in the court room, your

> own interpretation of it and your own recollection of it and not on what someone else who is sitting here wrote about it. You should not even discuss the case with your spouses tonight. You will have ample opportunity to discuss the case with each other tomorrow morning. I would like for you to come back and be here at nine o'clock and resume your deliberations with the hope that we can resolve the case, dispose of it one way or another.
>
> With those instructions, then, I am going to ask you to be excused and be back tomorrow morning at nine o'clock. (Tr. 34, 35; 10/17/84).[18]

The trial judge did not answer the question . . . the question was precise, direct, and critical to the disposition of the case.

Did not the trial judge have a duty consistent with *Bollenbach* . . . to clear away the jury difficulties with CONCRETE ACCURACY . . . 66 S.Ct. at 405.

May the instant conviction rest on this . . . equivocal direction to the jury on the *basic issue* in the case . . . 66 S.Ct. at 405.

It has oft been stated that the trial judge is not a mere moderator. Rather, the trial judge occupies the position of dominance during the trial proceeding. Should not the trial judge have given the jury an answer?

We say yes.

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[18] Neither the government nor the defense submitted any jury instruction as to Mississippi contract law. The trial court declined to advise the jury as to Mississippi law as it might relate to a breach of contract.

The jury was asking a legal question and that legal question called for a legal answer from the trial judge. As is obvious, rather than answer the question . . . the crucial question in the case . . . the trial court took the easy way out by telling the jury that they had to answer their own question. *Bollenbach* is to the contrary.

Under the circumstances at bar it is respectfully submitted that the trial court erred while declining to give the jury the sought-after-direction. The conviction should be reversed.

CONCLUSION

As to Questions I, II and III the Circuits lack accord. The decisions in *Francis v. Franklin* and *Sandstrom v. Montana* are not followed with any realistic degree of understanding.

Connecticut v. Johnson considers harmless error *vel non* absent any resolution.

This petition presents an appropriate vehicle wherein the Court might well put the confusion to rest. As pointed out, the Circuits split. It is respectfully urged that this Court grant certiorari and reverse the conviction in connection with Questions I, II and III.

As to Question IV, if *Bollenbach* represents sound Supreme Court law . . . then this Petition should be granted and the mail fraud convictions should be vacated.

Respectfully submitted,

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GROUP APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4030

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD H. KIMMEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi

(November 27, 1985)

Before CLARK, *Chief Judge*, BROWN and GEE, *Circuit Judges.*

GEE, *Circuit Judge.* Appellant Richard Kimmel was charged under 18 U.S.C. § 1341 with 23 counts of mail fraud and with obstruction of justice. Tried and found guilty of the mail fraud counts, he asserts on appeal that certain evidence was wrongfully excluded and that several jury instructions were erroneous. We conclude that his trial was conducted properly and therefore affirm his convictions.

In 1976 Kimmel purchased Medart, Inc., a Greenwood, Mississippi manufacturing operation, and contracted with ITT Commercial Finance Corporation to finance his purchase. The contract contained several financing arrangements, one of which involved Medart's accounts receivable. Under this particular arrangement, the amounts of ITT's loans were to be based on a percentage of current accounts receivable as reported by Medart to ITT. Medart was to assign all receivables to ITT in return and was required to forward receipts with each report submitted.

Because he used the United States mail to send these reports, Kimmel fell foul of the federal criminal laws, violating 18 U.S.C. § 1341 between January and April 1980 by sending a series of false reports to ITT. These reports omitted payments totaling over $660,000 that Kimmel had diverted into personal bank accounts. His ruse discovered, this trial eventually followed. Kimmel argued at trial that the diversions were a good faith attempt to keep Medart solvent, but the jury chose to disbelieve his tale and found him guilty on all mail fraud counts. Kimmel's only solace came from a finding of not guilty on the obstruction of justice count involving his alleged attempt to intimidate a witness. He now appeals, advancing various arguments for reversal.

I.

Kimmel first complains of the exclusion of certain evidence. In August 1981, ITT executed a written release absolving Kimmel from civil legal liability. Kimmel tried to introduce this release as evidence of his good faith in withholding the funds. The trial court held the release to be irrelevant, however, and refused to allow its admission. Although Kimmel challenges this refusal, we may not second guess the trial judge's evidentiary rulings absent an obvious abuse of discretion. No abuse appears here; rather, the court's decision appears to be fully justified. Kimmel's argument founders because of its inaccurate premise that ITT's release is logically relevant to

Kimmel's good faith diversions of the receipts. The release came eighteen months after the diversions and gives not the slightest indication of what went through Kimmel's mind as he mailed the false reports. The exclusion of the release therefore provides no basis for reversal. *Cf. United States v. Welliver*, 601 F.2d 203, 210 (5th Cir. 1979), (board of directors' subsequent acquiescence in a bank officer's misappropriation of funds held irrelevant in determining the officer's intent).

II.

Most of Kimmel's arguments focus on particular jury instructions, each of which we must consider to discern whether error occurred. We commence with the trial court's instruction on inferring intent:

> As a general rule it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant did possess the required intent.

Although this court, sitting *en banc*, approved an almost identical instruction in *United States v. Chiantese*, 560 F.2d 1244, 1255-56 (5th Cir. 1977), *cert. denied sub nom. Cerrella v. United States*, 441 U.S. 922 (1979), Kimmel nevertheless asks us to forbid its further use.

Admittedly, it bears a faint resemblance to certain instructions which effectually (and unconstitutionally) relieve the government from proving the intent element of a crime. *See Francis v. Franklin*, 471 U.S. ____, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Chiantese*, 560 F.2d at 1255. Despite the similar wording, however, an instruction announcing

a mandatory presumption differs sharply from one allowing a jury to infer intent. "A permissive inference does not relieve the state of its burden of persuasion because it still requires the state to convince the jury that the suggested conclusion should be inferred based on the predicate facts proven." *Francis*, 471 U.S. at ____, 85 L. Ed. 2d at 353. This difference is dispositive. The Supreme Court has prohibited instructions mandating an inference of intent because of their likely effect on the jury:

> The challenged sentences are cast in the language of a command. They instruct the jury that "acts of a person of sound mind and discretion *are presumed* to be the product of the person's will" and that a person "*is presumed* to intend the natural and probable consequences of his acts" . . . . The jurors "were not told that they had a choice or that they *might* infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory."

Francis, 471 U.S. at ____, 85 L. Ed. 2d at 354-55, *quoting Sandstrom*, 442 U.S. at 515 (emphasis added by the *Francis* Court). No such effect is likely here. Because the trial court never directed the jury to infer Kimmel's intent, we decline the invitation to ignore existing precedent on this kind of instruction. While both the Supreme Court and we have struggled often with inferred intent instructions, that given here is clearly acceptable and we are duty bound to follow the law approving its use.

Kimmel next attacks the court's instructions regarding his good faith defense, seen by him as "the key issue," asserting that the trial court "watered down" the instruction by suggesting that the defense does not justify false representations made to ITT.[1] We test the instruction not

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[1] Judge Biggers gave the following instructions on good faith:

> The court further instructs the jury that good faith is a defense to mail fraud. Therefore, if you believe from the evi-

(Footnote continued on following page)

against Kimmel's recommended instructions—for he lacks the right to have his recommendations adopted word for word—but against the law. "A district court has substantial latitude in tailoring his instructions as long as they fairly and adequately cover the issues presented by the case." *United States v. Pool*, 660 F.2d 547, 558 (5th Cir. 1981). Although we approved an instruction much like this one in *United States v. Wilkinson*, 460 F.2d 725, 729 (5th Cir. 1972), we must now examine the totality of the circumstances at trial; detached scrutiny of an instruction's four corners no longer suffices to determine its propriety. *United States v. Gray*, 751 F.2d 733, 735-36 (5th Cir. 1985).

In reality, a criminal defendant's good faith defense is the affirmative converse of the government's burden of proving his intent to commit a crime. Because this relationship exists, we must look at all opportunities Kimmel had to rebut the evidence suggesting his intent to defraud. The record shows that Kimmel testified about his motivation and that his counsel argued at length about Kimmel's good faith. The court's charge, taken as a whole, in no way shortchanged Kimmel; to the contrary, Judge Big-

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[1] *continued*

dence that the submittals containing incorrect information were sent to ITT for the purpose of enabling Medart to obtain from ITT money which the defendant had reasonable grounds for believing and did believe that Medart was entitled by contract to receive from ITT and were not sent to ITT for the purpose of defrauding ITT, then it would be your duty to find the defendant not guilty of the charges made in counts 1 through 23.

However, a fraudulent misrepresentation or fraudulent representation may be accomplished by conduct, by acts as well as by words, by silence when there is a duty to speak, by half-truths calculated to mislead, or by statements made with a reckless indifference as to whether they are true or false. Thus the defense claim of good faith, while relevant to innocence, would not justify false or reckless representations and promises made by a defendant.

Kimmel asserts that the second paragraph negates the impact of the first, thereby emasculating his good faith defense.

gers devoted much effort to explaining the government's burden of proving specific intent. In *Gray* we saw no error in the trial judge's refusal to give a good faith instruction because, "[t]aken together, the trial, charge, and closing argument laid Gray's theory squarely before the jury." 751 F.2d at 736. The facts of this trial show that Kimmel had just as great a chance to make his case.

We therefore move to Kimmel's next target on appeal, a "consciousness of guilt" instruction. As we noted above, the indictment contained 23 mail fraud counts and one obstruction of justice count for Kimmel's alleged intimidation of a witness. In charging the jury, the court instructed that, should the jury find Kimmel guilty of the obstruction of justice count, it might then view the attempted intimidation as relevant evidence in deciding whether the mail fraud occurred. This was proper; we have recognized the relevance of efforts at witness intimidation in showing the criminal defendant's consciousness of guilt about other crimes charged. *See United States v. Bright*, 630 F.2d 804, 821 (5th Cir. 1980). That the jury found Kimmel not guilty of the obstruction of justice count can hardly be said to strengthen his claim of error.

Armed with instructions such as these, the jury retired to deliberate at 12:15 P.M. At about 6:00 P.M. on the same day the jury requested the court's guidance:

> It the party, ITT, does not live up to certain parts of the contract, withholding nine hundred thousand dollars credit and cutting money returned to fifty percent, would this relieve Medart of the obligation of sending all receivables to ITT?

The court, however, declined to provide further instruction:

> That is a question of fact, which you must answer from the testimony that you have heard. It is not a question that the court can answer. That is your obligation, your responsibility, and your area, not mine, to answer that question. You take that answer

> from the testimony that you have heard, that has been presented to you.

Kimmel asserts that this refusal constituted an abuse of discretion because it deprived the jury of necessary guidance regarding governing law. Because Kimmel's counsel raised no objection to this exchange, however, only the most exceptional circumstances could warrant a reversal. Well-established law of our circuit confines review of an allegedly defective instruction to which no objection was made to that for plain error, which we have defined as a wrong so obvious and consequential "that our failure to notice it would result in a miscarriage of justice or would seriously affect the integrity or public reputation of the judicial proceeding." *United States v. Cauble*, 706 F.2d 1322, 1343 (5th Cir. 1983), *cert. denied* ____ U.S. ____, 104 S. Ct. 996, 79 L. Ed. 2d 229 (1984). We find no such egregious error here. The trial court's original charge clearly and thoroughly apprised the jury of its responsibilities. This being so, the judge need not have answered the jury's later questions. *See United States v. Middlebrooks*, 431 F.2d 299, 302 (5th Cir. 1970), *cert. denied* 400 U.S. 1009 (1971); *Eisenhardt v. United States*, 406 F.2d 449, 451 (5th Cir. 1969).

III.

We turn now to instructions given both in the original charge and on two occasions after the commencement of jury deliberation. This separate consideration is appropriate because a distinct body of law has arisen dealing with instructions urging a deadlocked jury to reach a verdict. Throughout the history of Anglo-American jurisprudence judges have tried to avoid the hung jury.[2] In the mid 19th

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[2] At early common law, some of their methods were not subtle: one circuit riding judge put jurors into oxcarts and carried them around with him until they had reached a decision. Comment, Deadlocked Juries and Dynamite: A Critical Look at the Allen Charge, 31 U. Chi. L. Rev. 386 (1964), *citing* Crabb, History of

(Footnote continued on following page)

century, American courts began instructing jurors to reach a verdict even if that required a re-examination of their convictions. The Supreme Court ruled that this instruction was constitutionally permissible in *Allen v. United States*, 164 U.S. 492 (1896). Since then, endless variations on the *Allen* theme have bedeviled courts and commentators struggling to establish guidelines for their use. Long ago, and of necessity, we resigned ourselves to reviewing potentially coercive instructions on a case-by-case basis.

The first instruction Kimmel challenges was part of the original charge given at noon.[3] At about four that afternoon the jury notified the court that it was deadlocked. The court recalled the jury and again urged it to reach a verdict.[4] Considered separately and in the abstract, the

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[2] *continued*
English law 287 (1829). Even in more recent times, American judges have resorted to physical coercion or threats of coercion. *See, e.g., Commonwealth v. Moore*, 398 Pa. 198, 157 A.2d 65 (1959) (jury forced to deliberate all night); *Mead v. City of Richland Center*, 237 Wis. 537, 297 N.W. 419 (1941) (threat of an unheated jury room made in the dead of winter).

[3] Now, any verdit (sic throughout) that you return must represent the considered judgment of each juror. In order to return a verdit, then, it will be necessary that each juror agree thereto. Before your verdit can be accepted by the Court, all twelve jurors must agree upon that verdit. It is your duty as jurors to consult with one another and to deliberate to each agree, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after impartial consideration of the evidence with your fellow jurors. Do not hesitate to re-examine your own views, do not hesitate to change your opinion if you are convinced that it is erroneous, but do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors. Remember at all times you not (sic) partisans, your are judges, judges of the facts, and your sole interest is to seek the truth from the evidence in this case.

[4] I am going to ask that you continue your deliberation in an effort to agree upon a verdit (sic throughout) and dispose of this

(Footnote continued on following page)

instructions are clearly proper. The original instruction scrupulously follows standard 15-4.4(a) of the American Bar Association's Standards for Criminal Justice (2nd ed. Supp. 1982) (hereinafter cited as ABA Standards) and obeys the spirit, if not the precise wording, of the Pattern Criminal Jury Instructions composed by the Federal Judicial Center Committee to Study Jury Instructions (Fed. Judicial Center 1982). Because it was given before

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[4] *continued*

case. I have a few additional comments I would like for you to consider as you do. This is an important case, the trial has been expensive in time, effort, money, both the defense and the prosecution. If you should fail to agree upon a verdit in this case, the case is left open and it must be tried again. Obviously, another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side better or more exhaustively than it was tried before you.

And any future jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could even be submitted to 12 men and women more conscientious, more impartial, more competent to decide it or that more clear evidence could be produced to them.

So I am going to suggest that if a substantial number, substantial majority of you are for a conviction, that each descending (sic) juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it appears to make no effective impression upon the minds of other people on the jury.

On the other hand, though, I want to also say that if a lesser number of you are for acquittal, or even if less than a majority of you are for acquittal, then the other jurors ought to seriously ask themselves again whether they do not have a reason to doubt the correctness of a judgment which is not shared by several of their fellow jurors, and whether they do not have a reason to doubt the correctness of a judgment which is not shared by several of their fellow jurors, and whether they should distrust the weight and sufficiency of the evidence which fails to convince several of their fellow jurors beyond a reasonable doubt.

I want you to remember at all times that no juror is expected to yield a conscientious conviction as to the weight or efficiency (sic) of the evidence, but I would like for you also to remember that after a full deliberation and consideration of the evidence in that case, it is your duty to agree upon a verdit in this case, if you can do so without surrendering your conscientious conviction.

the jury retired and "because it makes no reference to a minority but instead charges all jurors to consult with one another," the original instruction lacks harmful coercive effect. ABA Standards, pp. 15.134-35. The midafternoon instruction does not follow these recommended guidelines; we approved its use, however, in *United States v. Bottom*, 638 F.2d 781, 787 & n.7 (5th Cir. 1981), and *United States v. Baker*, 633 F.2d 696, 698-99 & n.6 (5th Cir. 1980). Because the evening instruction simply reiterated that of the afternoon, it provides no new basis for objection. If an error exists, therefore, it must come from the cumulative effect of these instructions.

We are required to consider all circumstances of the case. *See United States v. Fossler*, 597 F.2d 478, 485 (5th Cir. 1979). Those of this case evidence no coercive atmosphere sufficient to justify reversal. The trial court's instructions, taken as a whole, do not place undue pressure on the jurors. The above-quoted passages form only a small part of the total body of instructions, a body appearing well balanced and fair. Although he stressed the importance of reaching a verdict, the judge tempered his remarks with reminders that each juror should remain true to his own conscience. Nor were the jurors required to deliberate for an unreasonable length of time.[5] They conferred for seven or eight hours, not an unreasonable postlude to a week-long trial. The court's remarks, moreover, were not threatening in any way. Kimmel's right to an impartial and conscientious jury deliberation was preserved.

IV.

Kimmel's assertions discussed here provide no occasion for reversal; his others lack sufficient merit to require discussion. The trial court's judgment is therefore

AFFIRMED.

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[5] [T]he real question is whether the jury was required to deliberate an unreasonable length of time or for unreasonable intervals or was threatened with the prospect of such unreasonably lengthy deliberations. ABA Standards, p. 15.135.

GROUP APPENDIX B

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503. Influencing or injuring officer or juror generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other

committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Supreme Court, U.S.
FILED
MAR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD H. KIMMEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF, PER RULE 22.6, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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12pp

QUESTIONS PRESENTED

[I] Whether a jury instruction directing the trial jury to infer that the defendant ordinarily intends the natural and probable consequences of his knowing acts and that the accused intended all the consequences of such acts are prohibited under the decisions of the Court in *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana*, 442 U.S. 510 (1979)?

[II] Whether the current *split-in-Circuits* as to the interpretation of *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) merits the granting of this Petition and the vacation of the conviction below?

[III] Whether *Connecticut v. Johnson*, 460 U.S. 73 (1983) really means that an instruction such as given in this case can be treated as harmless error?

[IV] Whether the trial court's declination to answer the only real question in the case violates the ruling in *Bollenbach v. United States*, 326 U.S. 607 (1946)?

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In accordance with Rule 22.6, Rules of the United States Supreme Court this supplement to the now-pending Petition for Certiorari is being filed.

The Petition was docketed on January 17, 1986 (See App. 1, *infra*).

The government declined to respond and the Court, on February 13, 1986 directed that the government respond (See App. 2, *infra*).

The Solicitor General, by written request, has moved that the government be given to and including April 13, 1986 within which to file the government's response to this Petition for Certiorari (See App. 3, *infra*).

The above documents are appended to this Supplemental Brief as indicated by the appendix numbers.

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ARGUMENT:

[I] Whether a jury instruction directing the trial jury to infer that the defendant ordinarily intends the natural and probable consequences of his knowing acts and that the accused intended all the consequences of such acts are

prohibited under the decisions of the Court in *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana*, 442 U.S. 510 (1979)? 2

[II] Whether the current *split-in-Circuits* as to the interpretation of *Francis v. Franklin*, ____ U.S. ____, 105 S.Ct. 1965 (1985) merits the granting of this Petition and the vacation of the conviction below? 2

[III] Whether *Connecticut v. Johnson*, 460 U.S. 73 (1983) really means that an instruction such as given in this case can be treated as harmless error? 2

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD H. KIMMEL,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF, PER RULE 22.6, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I.

REASONS FOR GRANTING THE WRIT

[I] Whether a jury instruction directing the trial jury to infer that the defendant ordinarily intends the natural and probable consequences of his knowing acts and that the accused intended all the consequences of such acts are prohibited under the decisions of the Court in *Francis v. Franklin,* ____ U.S. ____, 105 S.Ct. 1965 (1985) and *Sandstrom v. Montana,* 442 U.S. 510 (1979)?

[II] Whether the current *split-in-Circuits* as to the interpretation of *Francis v. Franklin,* ____ U.S. ____, 105 S.Ct. 1965 (1985) merits the granting of this Petition and the vacation of the conviction below?

[III] Whether *Connecticut v. Johnson,* 460 U.S. 73 (1983) really means that an instruction such as given in this case can be treated as harmless error?

Subsequent to the filing of our Petition on January 17, 1986, we have located two (2) additional decisions which further exemplify the current split-in-Circuits in connection with the proper evaluation of both mandatory and permissive "intent" instructions. Accordingly, this short supplemental brief is submitted for additional consideration by the Court.

In *Flowers v. Blackburn,* 779 F.2d 1115 (CA 5, 1986), the Court granted §2254 relief and directed that *Flowers* be granted a new trial based upon jury instructions that violated due process.[1] In *Flowers* the Court reviewed the

[1] While granting §2254 relief the panel noted that the Supreme Court has not resolved whether the harmless error doctrine is applicable to a *Sandstrom* error, 779 F.2d at 1123, n. 9.

suggested analytical approach in connection with burden-shifting instructions (779 F.2d at 1120). The Court, found that PERMISSIVE INFERENCES violate the Due Process Clause . . .

> "only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury," (779 F.2d at 1120).

On the other hand, the *Flowers* panel stated:

> "mandatory presumption violate the Due Process Clause 'if they relieve the State of the burden of persuasion on an element of an offense,' " (779 F.2d at 1120).[2, 3]

The *Flowers* case continued with the following statement from an earlier Fifth Circuit decision:

> "The [intent-imputing] instruction may not have been read by any juror as affecting the requirement that they find [Flowers] guilty of lethal purpose. On the other hand, the jurors may have accepted the literal meaning of the instruction as stated above. The fact that a reasonable juror could have done so means that we must discount the possibility that the jurors actually did proceed as the trial court intended. *See Sandstrom.* We are left with 'a level of uncertainty and unreliability [in] the fact-finding process that cannot be tolerated in a capital case.' *Beck v. Alabama,*

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[2] Citations have been omitted from the texted quotations for the sake of brevity. It should be noted that the Court's decision in *Francis v. Franklin,* ____ U.S. ____, 105 S.Ct. 1965 (1985) is cited with approval at pp. 1119, 1120 and 1123 of *Flowers.*

[3] Kimmel, as petitioner herein, points out that the Court below in his case found that the offending instruction allowed only for a *permissive inference;* but the Court declined to ascertain whether UNDER THE FACTS OF THE CASE the permissive inference violated the Due Process Clause (777 F.2d at 292, 293).

> 447 U.S. 625, 643 [100 S.Ct. 2382, 2392, 65 L.Ed.2d 392] (1980). 694 F.2d at 78."[4]

In *Lakes v. Ford*, 779 F.2d 1578 (CA 11, 1986) the Court again granted §2254 relief following a murder conviction. The predicate for the granting of relief was the giving of the following instruction:

> "[T]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, and such person is presumed to intend the natural and probable consequences of his acts, but either of these presumptions may be rebutted." (779 F.2d 1580).

The state argued in *Lakes* that an immediate subsequent paragraph in the jury instructions shielded the earlier instruction from constitutional challenge. The next paragraph in *Lakes* jury instructions read:

> "Such person, however, would not be presumed to act with criminal intention, but you, the jury, may find such intention upon consideration of the words, the conduct, the demeanor, the motive and all other circumstances connected with the act for which the accused is on trial, it being your duty to carefully evaluate all of the relevant circumstances in that

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[4] This Fifth Circuit Statement is from *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (CA 5, 1982), modified, 697 F.2d 699 (CA 5, 1983).

Petitioner discerns the Court's vigil in connection with the fact-finding process in capital cases . . . but petitioner would point out that if there be a constitutional violation it matters not whether the petitioner looses his [or her] freedom for a substantial number of years or looses his [or her] life. In many instances the result has a tendency . . . to be the same.

In the instant case the petitioner, now serving a six (6) year sentence has lost his business, his home and his family. Thus the collateral consequences of his conviction and incarceration are not totally remote from that of a capital case.

regard, the question of intent resting finally with you," (779 F.2d at 1580).[5]

The *Lakes* panel found that the following language:

"it being your duty to carefully evaluate all of the relevant circumstances in that regard, the question of intent resting finally with you," (779 F.2d 1581).

. . . did not save the instruction(s) from constitutional challenge.

The Court held:

"But that distinction is not enough to cure the constitutional error in the mandatory presumption of intent. Given the construction we have found a reasonable juror might give the mandatory rebuttal presumption of intent, the assertedly curative language on criminal intent only contradicts the mandatory presumption without explaining its import and applicability. Further, the added language that we have rejected to explain to the jury that they should determine appellant's intent from the evidence alone, and

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[5] The petitioner at bar, Kimmel, points out that the challenged instruction as per his original petition and this supplemental brief reads as follows:

"As a general rule, it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the Defendant did possess the required intent," (Tr. 14; 10/17/84).

The petitioner finds no difference as between the instruction he challenges and the *instructions* reproduced from *Lakes, ante.*

The instructions in *Lakes* (taken together) and the single instruction as to the present petitioner are, upon analysis, identical.

> that they should not rely on the mandatory presumption to satisfy the state's burden of proof. If the extensive curative language present in *Franklin* was not enough to save the mandatory presumption there from constitutional infirmity, we cannot find virtually the same language, aided only by the clarification added by the italicized language quoted above, sufficient to cure the error in this case," (779 F.2d at 1582).[6]

As to harmless error *vel non* the *Flowers* panel noted that this Court has yet to resolve whether the *harmless error doctrine* is applicable to a *Sandstrom* error . . . 779 F.2d at 1123, n. 9 . . . however, the panel in *Flowers* also points out that the Fifth Circuit has, *sua sponte*, applied the harmless error doctrine . . . 779 F.2d at 1123, n. 9, collecting cases.

In *Lakes v. Ford, ante*, the Eleventh Circuit, while granting relief considered harmless error *vel non* finding that harmless error may exist notwithstanding either a *Sandstrom* or *Franklin* violation . . . 779 F.2d at 1583, 1584. Ultimately the *Lakes* panel found that *Lakes* was entitled to relief notwithstanding the potential for the invocation of the harmless error doctrine (*id.* at 1183, 1184).[7]

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[6] The *Lakes* panel, while granting §2254 relief, cited extensively from *Francis v. Franklin* and a number of Eleventh Circuit cases including *Kemp v. Thomas*, 766 F.2d 452 (CA 11, 1985); Petition for Cert. pending under this Court's docket number 85-736.

[7] *Contra*, see *Logan v. Abshire*, 778 F.2d 283 (CA 6, 1985) (vacating §2254 relief finding that *Sandstrom* error in instruction on presumption of intent was harmless beyond a reasonable doubt).

Thus it is clear, that the Circuits are hardly in accord as to the applicability of the harmless error doctrine in connection with *Sandstrom/Franklin* violations. It should also be noted that the *Logan* decision fails to cite the Court's 1985 *Francis v. Franklin* decision.

II.

CONCLUSION

In *Francis v. Franklin* the Court declined to resolve whether the harmless error doctrine is applicable to a *Sandstrom* error, 105 S.Ct. at 1977. The same might be said for *Connecticut v. Johnson*, 460 U.S. at 86-87, 103 S.Ct. at 977 (1983) (plurality opinion of Blackmun, J.).

Both the opening petition and this supplemental brief point out the multiple present problems within the criminal justice system in connection with the use and abuse of both mandatory and permissive "intent" instructions.

The Fifth Circuit, has found that instructions approved in petitioner's case . . . to be disapproved in other Fifth Circuit decisions (e.g., *United States v. Merkt*, 764 F.2d 266, 272 (CA 5, 1985) and *Flowers v. Blackburn*, 779 F.2d 1115, 1120-1123 (CA 5, 1986)).

Under such circumstances it would seem appropriate that this Court grant plenary review to the petitioner and vacate his conviction and sentence.

Respectfully submitted,

ALLAN A. ACKERMAN, Esq.
2000 N. Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891
Attorney for Petitioner

APPENDIX 1

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 28, 1986

Mr. Allan A. Ackerman
2000 N. Clifton Avenue
Chicago, IL 60614

Re: Richard H. Kimmel
v. United States
No. 85-1223

Dear Mr. Ackerman:

The petition for a writ of certiorari in the above entitled case was docketed in this Court on January 17, 1986 as No. 85-1223.

Forms are enclosed for notifying opposing counsel that the case was docketed.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

by /s/ FRANCIS J. LORSON

Francis J. Lorson
Chief Deputy Clerk

Enclosures

APPENDIX 2

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

February 13, 1986

The Honorable Charles Fried
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Re: Richard H. Kimmel v. United States
No. 85-1223

Dear Mr. Fried

Although your office has waived the right to file a response to the petition for a writ of certiorari in the above case, the Court nevertheless has directed this office to request that a response be filed.

Forty printed copies of your response, together with proof of service thereof, should reach this office on or before March 15, 1986.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

cc: Allan A. Ackerman, Esq.
2000 N. Clifton Avenue
Chicago, Illinois 60614

APPENDIX 3

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530
13 MAR 1986

The Honorable Joseph F. Spaniol
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Richard H. Kimmel* v. *United States*, No. 85-1223

Dear Mr. Spaniol:

The petition for a writ of certiorari in the above case was filed on January 17, 1986. Although the government waived its right to file a response to the petition, the Court has asked that a response be filed. The response is now due on March 14, 1986. We are hereby requesting, under Rule 29.3 of the Rules of the Supreme Court, an extension of time to and including April 13, 1986, within which to file the government's response.

This request for an extension of time is necessary because the attorney who has primary responsibility for preparing the government's response has been busy on other matters before this Court having earlier due dates.

Sincerely,

CHARLES FRIED
Solicitor General

cc: Allan A. Ackerman, Esq.
2000 N. Clifton Avenue
Chicago, Illinois 60614

APPENDIX 4

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

March 14, 1986

Honorable Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Re: Richard H. Kimmel v. United States
No. 85-1223

Dear Mr. Fried:

Your request of March 13, 1986, for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been extended to and including April 13, 1986.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Francis J. Lorson
Chief Deputy Clerk

FJL/dee

cc: Allan A. Ackerman, Esquire

(3)

Supreme Court, U.S.
FILED
APR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1223

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD H. KIMMEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

9PP

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1223

RICHARD H. KIMMEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the jury instructions contained an impermissible mandatory presumption concerning intent and that the district court committed plain error in refusing to resolve a question submitted by the jury during its deliberations.

1. Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on 23 counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to a total of six years' imprisonment. The court of appeals affirmed (Pet. App. A1-A10; 777 F.2d 290).

---

[1]Petitioner was acquitted on one count charging him with obstruction of justice.

The evidence adduced at trial, the sufficiency of which is not in dispute, is summarized in the court of appeals' opinion (Pet. App. A2). Briefly, it showed that in 1976 petitioner purchased Medart, Inc., a manufacturing company in Greenwood, Mississippi, and contracted with ITT Commercial Finance Corporation to finance the purchase. The amounts ITT was to lend to petitioner were based on a percentage of Medart's accounts receivables. Petitioner was obligated to report Medart's receivables to ITT and to assign all receivables to ITT in return for the loan. Between January and April 1980, petitioner submitted a series of false receivables reports to ITT. The false reports omitted a total of more than $660,000 in payments, which petitioner had diverted to other uses (*ibid.*).

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court appeals. Accordingly, review by this Court of petitioners' fact-bound claims is not warranted.

a. Petitioner contends (Pet. 8-15; Pet. Supp. Br. 2-6) that one of the district court's instructions on intent was invalid under *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), because it contained a mandatory presumption that shifted the burden of proof from the government to him.[2] That claim lacks merit.

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[2]The challenged instruction was as follows (Pet. App. A3; 10/17/84 Tr. 13-14):

> As a general rule it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing his knowledge should reasonably have expected to result from any act of conscious omission and any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant did possess the required intent.

The district court's instruction referred to a permissible inference, not a mandatory presumption. It was therefore materially different from the ones given in *Sandstrom* and *Francis*. In *Sandstrom*, the court's instruction said that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" (442 U.S. at 515). Similarly, the instructions in *Francis* stated that "[t]he acts of a person of sound mind and discretion are presumed to be the product of a person's will" and that "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted" (slip op. 7). In each case, the instruction created the risk that it could have been understood by the jury as a direction to presume an essential element of the charged offense. By contrast, the standard jury instruction that was given here told the jury only that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his acts. See 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 14.13 (3d ed. 1977). The instruction did not tell the jury that it must draw that inference; on the contrary, the instruction expressly told the jury that it "may draw the inference" (Pet. App. A3). Accordingly, as the court of appeals correctly noted, the instruction given here "differs sharply" from the ones in *Sandstrom* and *Francis* because "the trial court never directed the jury to infer [petitioner's] intent" (Pet. App. A4). Moreover, the instruction given here also differed from those given in *Sandstrom* and *Francis* in that here the inference was to be drawn only from petitioner's "knowing" acts (*id.* at 3). The instruction given in this case therefore was not erroneous. See, *e.g.*, *United States* v. *Love*, 767 F.2d 1052, 1059-1060 (4th Cir. 1985), cert. denied, No. 85-526 (Jan. 21, 1986); *United States* v.

Johnson, 756 F.2d 453,454-455 (6th Cir. 1985); *United States* v. *Caucci*, 635 F.2d 441,447 (5th Cir.), cert. denied, 454 U.S. 831 (1981).[3]

Petitioner claims (Pet. 10) that the instruction contained a mandatory presumption because his intent was the only contested issue at trial. That argument lacks any force. Whether intent was a disputed issue at a trial is relevant to the question whether an erroneous instruction prejudiced the defendant, but it is wholly irrelevant to the question whether there was an error in the first place.[4]

b. There is also no merit to petitioner's claim (Pet. 15-16) that the district court's answer to a question submitted by the jury during its deliberations constituted plain error. During its deliberations, the jury submitted the following question to the district court (Pet. App. A6; 10/17/84 Tr. 34):

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[3]Furthermore, a single jury instruction may not be considered in isolation, but must be viewed in the context of the entire jury charge and the record of the trial, because the charge as a whole may clarify an ambiguous instruction or, by correctly stating the law, dissipate any prejudicial effect resulting from a single erroneous instruction. See, *e.g.*, *Francis*, slip op. 11; *Henderson* v. *Kibbe*, 431 U.S. 145, 152-156 (1977); *United States* v. *Park*, 421 U.S. 658, 674-675 (1975). Here, the district court instructed the jury that the government had the burden of proving petitioners' guilt beyond a reasonable doubt (10/17/84 Tr. 6-7, 10, 11, 14, 17, 18, 19, 20), that the jury was entitled to draw reasonable inferences from the evidence adduced in court (*id.* at 4, 19), and that the jury must consider the charge as a whole (*id.* at 2). The jury therefore could not have been confused on this issue.

[4]Petitioner erroneously asserts (Pet. 10-13; Pet. Supp. Br. 2-6) that the decision below conflicts with other courts of appeals' decisions disapproving similar instructions. In fact, however, each of the cases cited by petitioner involved instructions that contained a mandatory conclusive or rebuttable presumption or that shifted the burden of proof to the defendant. There is also no need to hold this case pending the Court's resolution of *Rose* v. *Clark*, No. 84-1974 (argued Mar. 24, 1986). The issue in *Rose* is whether an erroneous presumption in jury instructions can be harmless; the instructions here contained no presumption.

> If the party, ITT, does not live up to certain parts of the contract, withholding nine hundred thousand dollars credit and cutting money returned to fifty percent, would this relieve Medart of the obligation of sending all receivables to ITT?

After consulting with counsel for the government and the defense, the court responded as follows (*id.* at A6-A7; 10/17/84 Tr. 34):

> That is a question of fact, which you must answer from the testimony that you have heard. It is not a question that the court can answer. That is your obligation, your responsibility, and your area, not mine, to answer that question. You take that answer from the testimony you have heard, that has been presented to you.

Defense counsel did not object at trial to this supplemental instruction (*ibid.*; *id.* at 36-38). Petitioner therefore cannot prevail unless the district court's action amounted to a miscarriage of justice. See *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15; *United States* v. *Frady*, 456 U.S. 152, 163 (1982).

The issue presented by the jury's question was whether petitioner's actions were justified on the ground that the victim of his scheme had allegely breached its contracts with Medart. The only possible relevance of that inquiry in the context of this case would be to petitioner's good faith in believing that he was entitled to make misrepresentations to ITT because of ITT's own breach of its obligations to Medart.[5] And, as the court of appeals noted (Pet. App. A7),

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[5]The court could properly have instructed the jury that its question was irrelevant, since even if Medart was not obligated to send all its receivables to ITT, petitioner was not thereby entitled to deceive ITT by misrepresenting the status of the receivables account. Such an instruction obviously would have been more unfavorable to petitioner than the instruction that the court actually gave.

"[t]he trial court's original charge clearly and thoroughly apprised the jury of its responsibilities" in connection with petitioner's good faith defense.[6] Petitioner does not argue to the contrary. In these circumstances, there was no error, let alone plain error, in the district court's refusal to instruct the jury further on that point.[7]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1986

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[6]The court gave the following instructions with regard to petitioner's good faith defense (Pet. App. A4-A5 n.1; 10/17/84 Tr. 15-16):

> The court further instructs the jury that good faith is a defense to mail fraud. Therefore, if you believe from the evidence that the submittals containing incorrect information were sent to ITT for the purpose of enabling Medart to obtain from ITT money which the defendant had reasonable grounds for believing and did believe that Medart was entitled by contract to receive from ITT and were not sent to ITT for the purpose of defrauding ITT, then it would be your duty to find the defendant not guilty of the charges made in Counts 1 through 23.
>
> However, a fraudulent misrepresentation or fraudulent representation may be accomplished by conduct, by acts as well as by words, by silence when there is a duty to speak, by halftruths calculated to mislead, or by statements made with a reckless indifference as to whether they are true or false. Thus the defense claim of good faith, while relevant to innocence, would not justify false or reckless representations and promises made by a Defendant.

[7]Petitioner's reliance (Pet. 15, 17) on *Bollenbach* v. *United States*, 326 U.S. 607 (1946), is misplaced. In that case, the district court's answer to a jury question contained an erroneous presumption which, the facts graphically revealed, clearly prejudiced the defendant. *Id.* at 609-610.

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